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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 677

MORRIS H. SENDEROWITZ, MORRIS SENDEROWITZ AND ABRAHAM M. SENDEROWITZ, INDIVIDUALLY AND AS CO-PARTNERS TRADING AS ROYAL MANUFACTURING COMPANY, PETITIONERS

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

No. 678

MORRIS H. SENDEROWITZ, MORRIS SENDEROWITZ AND ABRAHAM M. SENDEROWITZ, INDIVIDUALLY AND AS CO-PARTNERS TRADING AS ROYAL MANUFACTURING COMPANY, PETITIONERS

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 7a–22a) is reported in 65 F. Supp. 548. The opinion of

the circuit court of appeals (R. 30–42) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered on August 19, 1946 (R. 43, 44). The petition for writs of certiorari was filed on November 8, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

Where certain sales of apparel were subject to a maximum price regulation which required the seller to submit tentative ceiling price computations for possible prospective revision by the Administrator to conform to the regulation's standards, and the seller failed to submit such computations within the time required and until after a statutory damage action had been filed by the Administrator; and after such submission, the Administrator issued an order definitely fixing the ceilings for these prior sales,

(1) whether the exclusive jurisdiction provisions of Section 204 (d) of the Emergency Price Control Act, as amended, required the courts below to assume the validity of the Administrator's order and apply it to the sales to which it was expressly made applicable;

(2) if Section 204 (d) be regarded as inapplicable,

(a) whether the doctrine invoked by the District Court, that "the rights of the parties must be determined on facts existing at the inception of the suit" has any relevance to this suit;

(b) whether the petitioner, who illegally withheld the report of his tentative ceiling price computations until after the damage action had been filed, has standing to assert and is correct in his position, that the Administrator is without power to establish prices applicable to the prior sales.

(3) whether this Court should reverse the findings of both the courts below that the sales in question were made to wholesalers or retailers for use in the course of trade or business, and that the overcharges were wilful or the result of failure to take practical precautions to prevent their occurrence.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (hereinafter sometimes referred to as the Act) and of the General Maximum Price Regulation (hereinafter sometimes referred to as the GMPR) are set forth in the Appendix, *infra*, pp. 22–35.

STATEMENT

Petitioners in 1943 and 1944 manufactured and sold certain styles of men's underwear known as

"shorts." Some of these styles (Nos. 1810, 1850, 461, 469 and 459 (b)) had been sold during March, 1942; and under the provisions of Section 1499.2 of the GMPR, the prices charged at that time became the lawful ceiling prices. Undisputed evidence showed that the petitioners made certain sales of these styles at prices totaling $419.05 in excess of the ceilings (R. 21a). Other styles (Nos. 259, 259 (b), and 467), also sold by the petitioners in 1943 and 1944, had not been sold during the base period (R. 18a). They were made of cotton cloth with a construction of only 44 by 36 threads to the inch. Shorts of otherwise similar style, but made of 60 by 48 or 64 by 60 thread count, had been sold by the petitioners during the base period. Section 1499.3 of the GMPR, which was applicable where the same or similar commodities had not been sold during the base period, provided that the ceilings were to be maximum prices "in line with the level of maximum prices established by this General Maximum Price Regulation," and subsection (b) (1) of Section 1499.3 provided a method whereby the seller could compute tentative ceiling prices by means of a formula. The prices so computed were to be reported to the Price Administrator, and were "subject to adjustment at any time by the Office of Price Administration."

The petitioners made no such report within the required time (R. 19a). They made no effort to inform the Administrator about their marketing of

new styles, and afforded him no opportunity to adjust their prices to bring them into line. Between March, 1943, and April, 1944, they sold large quantities of style 467 at prices ranging from $2.90 to $3.15 per dozen, and styles 259 and 259 (b) at from $2.37½ to $2.50 per dozen (R. 18a).[1] The Administrator learned of these dealings at a time when the one-year statute of limitations provided in Section 205 (e) in the Act had already run as to some of these sales and was about to bar recovery based on additional ones. On July 14, 1944, the Administrator therefore commenced an action for injunctive relief and for treble damages, alleging sales exceeding the ceilings by $100,000 (R. 1a, 8a). On August 1, 1944, the petitioners finally filed with the OPA their reports of computations of ceiling prices for styles 467 and 259 under Section 1499.3 (b) (1) of the GMPR (R. 3a) (They apparently decided to treat style 259 (b) as the same item as style 259.) The reports computed the ceilings at $3.169 per dozen for style 467 and $2.839 per dozen for style 259.

On October 20, 1944, the OPA Regional Administrator issued Order No. 112 under Section 1499.3 (e) (1) of the GMPR, which revised the reported ceilings to $1.60 per dozen for style 467 and $1.50 per dozen for style 259 (R. 3a–4a).

[1] The reference to these prices as "Royal's highest ceiling prices" on page 10 of the petition, is misleading. These were petitioners' self-determined selling prices, not the legal maximum prices.

The Order set forth that no shorts similar to these styles had been sold by the defendants or any of their competitors during March, 1942, and that therefore Section 1499.3 of the GMPR became applicable, but that the reported prices were not in line with the level of maximum prices established by the GMPR. The Statement of Considerations, *infra*, pp. 33–35, to this order stated that in March, 1942, 44 by 36 cloth was used only for bookbindings and was considered impractical and unserviceable for use in men's undershorts; that business firms specializing in even the cheapest merchandise had never encountered shorts made of such material, and that even shorts made from 60 by 48 material had sold at only $1.80 per dozen.[2]

On May 8, 1945, this Order was amended to insert language expressly making it applicable to sales made before its issuance[3] (R. 5a).

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[2] Statements of Considerations are official office documents setting forth reasons for the establishment of maximum prices. The Statement involved here is not in the Record, but the courts are not barred from taking judicial notice thereof. *Bowles* v. *United States*, 319 U. S. 33; *Jones* v. *United States*, 137 U. S. 202.

[3] The original order purported to be issued under Section 1499.3 (e) (1) of the GMPR, which was in effect at the time of issuance and at the time the petitioners' prices were filed (having been added by Amendment 61, effective June 1, 1944, 9 F. R. 5169). Section 1499.3 (b) (1), which was in effect at the time of the sales also gave authority to adjust prices—though the authority to adjust retroactively was not set forth explicitly. The amended order, being of a *nunc pro tunc* character, is properly in terms of Section 3 (b) (1). The fact

At the trial, at the close of the Administrator's evidence, the petitioners rested and moved for dismissal (R. 8a). The district court found that the sales had been made in the course of trade or business to wholesalers or retailers (R. 21a). Judgment was entered for $1,257.15 (treble the amount of overcharges on the sales of styles Nos. 1810, 1850, 461, 469, and 459 (b)), and injunctive relief was also granted (R. 23a). In awarding full treble damages, the court found that the petitioners' sales at excessive prices "were either wilful or the result of defendants' failure to take practical precautions against the occurrence of such violations. Defendant's conduct was in complete disregard of the requirements of the General Maximum Price Regulations and the duties imposed upon them by law." (R. 21a). That portion of the Administrator's claim requesting damages for overceiling sales of styles 259, 259(b) and 467 was dismissed on the ground that the plaintiff did not have a cause of action at the

that Section 1499.3 (e) (1) merely restated the power previously existing under Section 3 (b) (1) was noted as follows by the court below (R. 41): "Ever since the origin of the regulations in 1942 the policy has been that of keeping individual maximum prices in line with the level of maximum prices established by the regulations. To effectuate this policy the Administrator has always had the power to adjust submitted maximum prices at any time. Upon inspection of the subsequent amendments it is evident that only a change in the form of statement has occurred and not a change in the Administrator's powers of adjustment."

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time the complaint was filed (R. 7a–17a). These sales were at prices in excess of those established by Order No. 112 to the extent of $49,192.34, three times which is $147,577.02.

Both parties appealed. The circuit court of appeals affirmed that portion of the judgment awarding damages of $1,257.15 and granting an injunction, and reversed and remanded the portion refusing to award damages based upon sales of styles 259, 259(b), and 467 (R. 43, 44). The circuit court reached its conclusion both by reference to the exclusive jurisdiction provisions of the Act and by a consideration of the issues on the merits.

DISCUSSION

I

In deciding the issues presented concerning Order No. 112, as amended, *infra*, pp. 30–33, the court below rested its decision on two grounds: (1) that the issuance of the retroactive provisions of the order constituted a valid exercise of the Price Administrator's power, and (2) that jurisdiction to determine the validity of the order was placed exclusively in the Emergency Court of Appeals by Section 204 (d) of the Emergency Price Control Act, *infra*, p. 23.

A. We believe the second phase of the decision of the court below is correct, since it can scarcely be contended that Order No. 112, as amended, is not one of the orders contemplated by Section 204

(d). That section plainly confers upon the Emergency Court of Appeals exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2 of the Act and expressly deprives other federal courts and state courts of jurisdiction to consider the validity of such regulations and orders. The constitutionality of Section 204 (d) was considered and upheld by this Court in *Yakus* v. *United States,* 321 U. S. 414. See also, *Bowles* v. *Willingham,* 321 U. S. 503; *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410; and *Case* v. *Bowles,* 327 U. S. 92. It has likewise been specifically held that Section 204 (d) applies to attacks on the retroactivity of pricing orders in treble-damage actions. *Martini* v. *Porter,* 157 F. 2d 35 (C. C. A. 9), petition for certiorari filed December 23, 1946, No. 813; *Porter* v. *Eastern Sugar Associates,* C. C. A. 4, January 6, 1947 not yet reported. The issue involving the alleged invalidity of the retroactive provisions of Order No. 112, as amended, therefore, is one beyond the jurisdiction of the court below to determine, or of this Court to determine in this proceeding.[4]

[4] Following denial of petitioners' protest to the Administrator as to the validity of Order No. 112, they filed a complaint with the Emergency Court of Appeals which is presently pending, *sub nom. Senderowitz, et al.* v. *Fleming* (E. C. A. No. 377).

Petitioners attempt to avoid the effects of the exclusive jurisdiction provisions of Section 204 (d) by phrasing their objection to the validity of Order No. 112 in terms of the un-

B. The court below, however, did consider the validity of the order and upheld it. The court held that because the petitioners had failed to report their prices to the Price Administrator as required by Section 1499.3 (b) (1) of the General Maximum Price Regulation as amended by Amendment 54, *infra*, pp. 25–27, they were not in a position to complain that maximum prices for the goods which they had sold without complying with the regulation had not been fixed at the commencement of the suit, or that the order which retroactively fixed such prices was invalid (R. 40).

Although we are of the opinion that the court below had no jurisdiction to consider or pass upon the validity of Order No. 112, as amended, we think the reasoning which it employed with respect to the validity of the order is sound. Order No. 112, as amended, which is being applied in this civil case, is plainly not *ex post facto*, since only a law relating to a criminal prosecution is

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constitutionality of Section 205 (e) of the Act as applied to Order No. 112. But the seat of the alleged defect here (invalid retroactivity) is not the enforcement proceeding under Section 205 (e), but the price order itself. If the attack can always be translated into terms of the enforcement provisions of Section 205, Section 204 (d) will become meaningless and in every enforcement action the validity of the regulation or order involved will be open to question. As this Court has already warned, the right to attack the validity of the statute in an enforcement proceeding under the Act "may not be utilized as a means of indirectly attacking the regulations themselves instead of the statute" (*Case* v. *Bowles*, 327 U. S. 92, 98).

within the scope of the constitutional prohibition against laws of that character. *Calder* v. *Bull*, 3 Dall. 386; *Kentucky Union* v. *Kentucky*, 219 U. S. 140; *Bankers Trust Co.* v. *Blodgett*, 260 U. S. 647. Nor does its retroactive force violate the due-process clause of the Fifth Amendment. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226. Cf. *Graham & Foster* v. *Goodcell*, 282 U. S. 409; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8. This Court has frequently remanded cases to the district courts so as to permit the issuance of administrative orders which would relate back and determine the liability involved in the original suit. *General American Tank Car Corp.* v. *El Dorado Terminal Corp.*, 308 U. S. 422; *Addison* v. *Holly Hill Fruit Products Corp.*, 322 U. S. 607; *Thompson* v. *Texas-Mexican Ry. Co.*, No. 42, October Term, 1945, decided April 29, 1946; *Smith* v. *Hoboken R. R., Warehouse & S. S. Connecting Co.*, No. 384, October Term, 1945.

Retroactive measures are not invalid *per se*, unless the effect of their operation is arbitrary or unreasonable. *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 476, (per Holmes, J.), approved in *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 315–316. This is not a case in which the party adversely affected by the retroactive statute or order has relied to his detriment upon the pre-existing state of the law. Cf. *Chase Secu-*

rities Corp. v. *Donaldson, supra; Welch* v. *Henry,* 305 U. S. 134, 147; *Milliken* v. *United States,* 283 U. S. 15, 23. In the case at bar, the sales made by the petitioners were unlawful, since it was in violation of the Regulation to sell without filing, within ten days, reports which would permit administrative adjustment. Clearly it is not unreasonable or arbitrary to prevent a person from escaping liability because of his own unlawful conduct. *Stearns Co.* v. *United States,* 291 U. S. 54, 61–62.

The decision of the court below is in harmony with the holding of the Circuit Court of Appeals for the Ninth Circuit in the case of *Martini* v. *Porter,* 157 F. 2d 35, now pending on a petition for a writ of certiorari, *sub nom. Martini* v. *Fleming,* No. 813, this Term, and *Porter* v. *Kramer,* 156 F. 2d 687 (C. C. A. 8), wherein retroactive orders issued under similar maximum price regulations were determined to be valid.

II

The pronouncements of the court below with respect to the validity of Order No. 112, as amended, may be fairly said to be in conflict with the decision of the Emergency Court of Appeals in the case of *Collins et al.* v. *Fleming* (not yet reported—copies of the opinion are being lodged with the Clerk of this Court), Nos. 352, 353, and 357, Emergency Court of Appeals, decided January 2, 1947, in which the Administrator has re-

quested a rehearing, and in which, should the decision stand, the Government contemplates filing a petition for a writ of certiorari in this Court because of the conflict and the importance of the question.[5]

In the *Collins* case the complainants had sold certain warehouse receipts for whiskey without having previously applied, as required by the regulation, for an order prescribing a method for determining the applicable ceiling prices. Thereafter, a treble-damage action was instituted against the sellers in the United States District Court for the Western District of Kentucky, and

[5] Petitioners cite as being in conflict with the decision in the instant case, the cases of *Porter* v. *Block* and *Porter* v. *Sherwood Distilling Co.*, 156 F. 2d 264 (C. C. A. 4). These cases held merely that there was no jurisdiction under Section 205 (a) of the Act for the issuance of a mandatory injunction to require a seller to apply for a retroactive maximum price. On Petition for Rehearing or Clarification, the court stated that its decision was without prejudice to the Administrator's right to establish retroactive maximum prices even then and to seek permission from the district court to file a supplemental pleading taking into account such retroactive prices to bolster the treble-damage count of the Administrator's complaint. *Bowles* v. *Lake Lucerne Plaza, Inc.*, 148 F. 2d 967 (C. C. A. 5), certiorari denied, 326 U. S. 726, held that an order granting an upward adjustment in defendant's maximum rents was to be construed as applicable prospectively only. It may also be noted that the court held that any objection to the non-retroactivity of the adjustment could be raised only before the Emergency Court of Appeals.

The case of *Ambrosia Brewing Co.* v. *Bowles*, 147 F. 2d 550 (E. C. A.), likewise cited by petitioners, is plainly not in conflict with the decision in the case at bar.

the Price Administrator subsequently promulgated Order No. 45 retroactively establishing maximum prices applicable to the sales involved in the treble-damage action. The Emergency Court of Appeals held the order to be invalid on the ground that the basic regulation itself established in-line prices which could be translated by the district court into dollars and cents, and that since the Price Administrator had committed this issue to the district court when he instituted the treble-damage action, his retroactive order establishing prices for the sales involved in that action was no more than a liquidation of the damages claimed and was, therefore, an illegal attempt by him to determine a factual issue wholly within the jurisdiction of the district court.

The regulatory provisions applicable in the *Collins* case and the case at bar are indistinguishable. Those involved in the *Collins* case[6] pro-

[6] Section 1499.3 (c) of the General Maximum Price Regulation at the time of the sale involved in the *Collins* case read as follows: "(c) In the case of a sale at wholesale or retail of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall be a price determined by the seller after specific authorization from the Office of Price Administration or any duly authorized officer thereof. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a

vided that the maximum prices of all sellers subject to the particular provisions of the regulation should be in line with those otherwise established by the regulation and required that such sellers apply to the Administrator to have those maximum prices specified. In the instant case the court below was of the opinion that the provisions of the same regulation as amended were applicable. By the terms of that amendment (Appendix, *infra*, pp. 25–27) sellers who, like those involved in the *Collins* case, were unable to determine their maximum prices in accordance with other provisions of the regulations were allowed to compute their maximum prices in accordance with the formula set forth in Section 1499.3 (b) and required to report that price to the Administrator, and the Administrator reserved the power to adjust that maximum price if it was deemed necessary. In the *Collins* case the sellers did not apply as required and in the instant case the petitioners did not report as required. In each case, after

maximum price is sought; (2) a statement of the reasons why such commodity or commodities cannot be priced under Sec. 1499.2 or Sec. 1499.3 (a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. Such authorization will be given in the form of an order prescribing a method of determining the maximum price."

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the Administrator had commenced a suit for damages under Section 205 (e) of the Act he issued an order specifying in dollars and cents the maximum prices applicable for the particular sales.

The Emergency Court of Appeals held in the *Collins* case that no such further administrative action was proper, the Third Circuit Court of Appeals in the instant case has expressed a contrary view.

We submit that the regulation both before and after the amendment properly contemplated that the Administrator would specify or have the opportunity to specify the dollars and cents maximum prices applicable to particular sellers, and that this task would not be left, as the Emergency Court of Appeals suggested, to those courts called upon to pass on suits brought under Section 205 (e) of the Act. In the case of such a regulation, when the seller has not taken the required steps to permit administrative action, the Administrator should have the power to specify prices even after the sale in order to prevent a seller from escaping damage suits by reason of his own wrong. The Administrator has not claimed, however, the right to issue such orders specifying maximum prices if the regulation standing alone provides a means of determining the specific applicable maximum price without need for steps which will permit further administrative action.

The regulation involved here is the General Maximum Price Regulation and similar provisions have been employed by the Price Administrator in other regulations of broad applicability. Orders similar to the one involved here have been issued in connection with several hundred damage suits brought under Section 205 (e) of the Act. Not only does the decision of the Emergency Court of Appeals on the issue of the validity of a retroactive order conflict with that of the court below but it also conflicts with decisions of the Eighth and Ninth Circuits in the *Kramer* and *Martini* cases, *supra,* respectively. Resolution of the conflict, therefore, is sufficiently important to warrant review of the question by this Court.

Because of the presence of the jurisdictional question in the case at bar, however, this case may not be an appropriate one in which to resolve the conflict between the decision in the *Collins* case

[1] The Emergency Court of Appeals was of the opinion that the regulation fell in this class, and seemingly thought that its construction of the regulation was in accordance with the Administrator's own interpretation. An examination of the Administrator's brief and the transcript of oral argument before the Emergency Court of Appeals however indicates that the court misunderstood the Administrator's true position. It is for this reason that the Administrator has filed a petition for a rehearing in the Emergency Court of Appeals in the *Collins* case instead of immediately petitioning for certiorari. It is to be noted that Judge Maris, who wrote the opinion in the *Collins* case, also concurred in the decision of the Third Circuit in the case at bar.

and the decision of the court below. For if this Court should determine that the lower court had no jurisdiction to pass upon the validity of the regulation in the present case, it would not reach the issue upon which there is a conflict. Nevertheless, if this Court is of the opinion that the present case is an appropriate vehicle for resolution of the conflict, we would not oppose the granting of the writs herein sought with respect to that question and the issue as to the exclusive jurisdiction of the Emergency Court of Appeals.

III

Petitioners assert that there was no evidence to show that the sales were made to wholesalers or retailers as distinguished from ultimate consumers. The evidence upon which the district court based its finding rests in large measure upon plaintiff's Exhibit 3, a 35-page transcript of sales invoices (identified at page 46 and introduced at page 55 of the Transcript of Testimony). This exhibit is not part of the Record here, nor was it before the circuit court of appeals. Therefore, petitioners cannot assert that the evidence did not support the finding; and the Administrator is entitled to rely on the finding of the court to prove his cause of action, without having to go behind it. At any rate, there is testimony in the Transcript showing that petitioners' sales ranged from 24 to 354½ dozen shorts to a cus-

tomer; also the names of the customers indicated that they were either firms or stores (Transcript of Testimony, pp. 54–55, 135–136; see R. 46). Clearly, this justified the court below in affirming the district court's finding that petitioners, who concededly were large-scale manufacturers, did not sell to individual consumers but to wholesalers and retailers who were purchasing for use in the course of trade or business.

As to the finding in respect to wilfulness in connection with the sales upon which the trial court granted judgment, it may be noted that the burden of proving the so-called "Chandler defense"* has been specifically placed upon the seller by the statute. At the conclusion of plaintiff's case, petitioners moved to dismiss, thus declining to introduce any evidence of their own to establish the Chandler defense; there was, therefore, no opportunity for the Administrator to rebut such evidence and to introduce evidence specifically showing wilfulness. Even were this not so, the evidence in the case at bar would have been sufficient to justify the court in its findings. Petitioners marketed and sold huge quantities of

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*The defense is that the overcharges were neither wilful nor the result of failure to take practical precautions to prevent their occurrence. (Section 205 (e) of the Act, as amended by the Stabilization Act of 1944, 58 Stat. 632). If this defense is proved, damages are limited to the amount of the overcharge.

three new styles of shorts manufactured from egregiously inferior and unserviceable materials without obeying the plain mandate of the regulation, requiring them to report their tentative maximum prices. They also charged more than the ceiling prices already established on several other styles. Their base period figures were wrong and had to be corrected. The trial court was clearly justified in finding (R. 21a), particularly in view of the petitioners' failure to offer any extenuation, that "Defendants' conduct was in complete disregard of the requirements of the General Maximum Price Regulations and the duties imposed upon them by law."

Furthermore, the concurrence of both courts below in the findings fortifies the conclusion that they were not erroneous and should justify this Court in being particularly hesitant to overturn them. See, *United States* v. *Commercial Credit Co., Inc.*, 286 U. S. 63, 67; *Williams Manufacturing Co.* v. *Shoe Machine Corp.*, 316 U. S. 364, 367; *Goodyear Tire & Rubber Co., Inc.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 278.

CONCLUSION

The judgment of the court below is correct. However, if this Court considers this case a proper vehicle for resolution of the conflict of

decisions herein pointed out, we do not oppose the granting of the petition, except as to the issues discussed in Point III hereof. As to those issues the petition should be denied.

Respectfully submitted,

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JANUARY 1947.

APPENDIX

STATUTE AND REGULATION INVOLVED

1. *Emergency Price Control Act.*—The pertinent sections of the Emergency Price Control Act, as amended (56 Stat. 23; 58 Stat. 632; 59 Stat. 306; 50 U. S. C. App., Supp. V, 901 et seq.), are as follows:

Section 2 (c). Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. * * *

Section 2 (g). Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

Section 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or

of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Section 201 (d). The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

Section 204 (d). * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Section 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from

the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful, nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is

instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered. [The amendment made by subsection (b),[1] insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.]

2. *General Maximum Price Regulation.*

Section 1499.1 (a)—(7 F. R. 3153).

Section 1499.1 *Prohibition against dealing in commodities or services above maximum prices.* On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

(a) No *person* shall *sell* or deliver any *commodity,* and no person shall sell or supply any *service,*

[1] This refers to Sec. 108 (b) of Stabilization Extension Act of 1944.

at a price higher than the maximum price permitted by this General Maximum Price Regulation; and * * *

* * * * * *

Section 1499.3 (b) (1), as amended by Amendment 54 (7 F. R. 3153; 8 F. R. 6962).

Section 1499.3. *Maximum prices for commodities and services which cannot be priced under § 1499.2.* The seller's maximum price for a commodity or service which cannot be priced under § 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation. Such price shall be determined by the seller in accordance with the following procedures: * * *

(b) In the case of a sale, other than at wholesale or retail, of a commodity for which a maximum price or pricing method has not been specifically authorized by the Office of Price Administration,

(1) The seller (i) shall select a comparable commodity for which a maximum price has been established under § 1499.2 (a) (1) of this regulation; (ii) shall divide his maximum price for the comparable commodity by its current direct cost; and (iii) multiply the percentage so obtained by the current direct cost of the commodity being priced. All customary discounts, trade practices, and practices relating to the payment of transportation charges in effect with respect to the sale of the comparable commodity shall apply to such maximum price.

"Comparable commodity" as used in this subparagraph (1) means a commodity which is made

by the same seller, has the same general use and is recognized in the trade or industry as being of the same general type, even though different materials or construction are used, and has a current direct cost varying by not more than 50% from the current direct cost of the commodity being priced. If more than one commodity can be regarded as comparable, the one whose current direct cost is closest to the current direct cost of the commodity being priced shall be regarded as the comparable commodity.

"Direct cost" means the sum of direct labor and direct material costs. Direct labor costs shall in no event be computed on wage rates higher than those permitted by law, and direct material costs shall in no event be computed on prices higher than the maximum prices established by the applicable maximum price regulations.

Within ten days after determining a maximum price under this subparagraph (1), the seller shall report such price to the appropriate field office of the Office of Price Administration upon a form, duly filled out, copied from the form contained in Appendix C of this regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

Section 1499.3 (b) (1), as amended by Amendment 61 (7 F. R. 3153; 9 F. R. 5169).

Section 1499.3 *Maximum prices for commodities and services which cannot be priced under § 1499.2.* A seller's maximum price for a commodity or service which cannot be priced under

§ 1499.2 and for which a maximum price or pricing method has not been otherwise established by the Office of Price Administration shall be a maximum price in line with the level of maximum prices established by this regulation and shall be determined in the following manner: * * *

(b) In the case of a sale other than at wholesale or retail of a commodity:

(1) The seller shall (i) find the most comparable commodity for which he then has a maximum price under § 1499.2 (a) (1); (ii) divide this price by the current unit direct cost of such commodity; and (iii) multiply the percentage so obtained by his current unit direct cost for the commodity being priced. The resulting figure shall be his maximum price for the commodity. All customary allowances, discounts, or other price differentials and all practices relating to the payment of transportation charges in effect with respect to the most comparable commodity shall apply to the commodity being priced.

The "most comparable commodity" under this paragraph (b) (1) must meet all of the following tests:

(1) It must belong to the narrowest trade category which also includes the commodity being priced.

(2) It must have a current unit direct cost varying from that of the commodity being priced by not more than 25% of the latter cost.

(3) It must be currently produced by the seller or, if he is not currently producing a comparable commodity, it must have been produced by him within the twelve months preceding his use of this pricing method.

If more than one commodity meets all the above tests, the one whose current direct cost is nearest to the current unit direct cost of the commodity being priced shall be the "most comparable commodity."

"Current unit direct cost", as used above, means the sum of the amounts (not higher than permitted by law) which it costs the seller, or if he is not currently producing it, would cost him, for direct labor and materials to produce the commodity at the time he uses this pricing method.

The maximum price determined for the commodity under this paragraph (b) (1) shall, before such commodity is offered for sale, be reported by the seller to the District Office of the Office of Price Administration for the District in which his main office is located. The report shall be made in duplicate upon a form copied from Appendix C of this regulation. A maximum price so determined and reported may not be redetermined by the seller even though his costs increase.

Section 1499.3 (e) (1), as added by Amendment 61 (9 F. R. 5169).

(e) (1). The Price Administrator, or any Regional Administrator or any State or District Director so authorized by his Regional Administrator, may at any time approve, disapprove or revise maximum prices reported, proposed or established under paragraphs (a), (b) (1), or (c) of this section so as to bring them into line with the level of maximum prices otherwise established by this regulation.

3. *Order No. 112 under Section 1499.3 (e) (1) of the General Maximum Price Regulation.*

OFFICE OF PRICE ADMINISTRATION
350 Fifth Avenue
NEW YORK 1, N. Y., *October 20, 1944.*
File No. 2–13b 1–341.2–8

ROYAL MANUFACTURING CO.,
93 Worth Street,
New York, N. Y.

ORDER NO. 112 UNDER SECTION 1499.3 (e) (1) OF THE GENERAL MAXIMUM PRICE REGULATION

GENTLEMEN: This is in reference to your reports dated August 1, 1944, determining a maximum price under Section 1499.3 (b) (1) of the General Maximum Price Regulation for two styles of men's shorts.

It appears that you were in business during March, 1942; that you did not deliver or offer for delivery the same or any similar commodity during March, 1942; that insofar as you have been able to ascertain no closely competitive seller delivered or offered for delivery the same or similar commodity during March, 1942; that you did deliver or offer to deliver a "comparable" commodity during March, 1942 for which a price has been established under Section 1499.2 of the General Maximum Price Regulation.

Section 1499.3 of the General Maximum Price Regulation provides that the seller's maximum price for a commodity which cannot be priced under Section 1499.2 of the General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices estab-

lished by the General Maximum Price Regulation. We have examined the cost figures and markup submitted by you and it is our opinion that the maximum price reported by you is not in line with the level of maximum prices established under the General Maximum Price Regulation and accordingly the maximum price reported by you should be revised.

After due consideration of the foregoing and under the authority vested in the Regional Administrator of Region II of the Office of Price Administration by Section 1499.3 (e) of the General Maximum Price Regulation, *it is Ordered:*

1. That your maximum selling price for your sales to wholesalers and retailers shall be established as follows:

Description:	*Style No.*	*Authorized maximum prices*
Men's Shorts made of 44 x 36 cotton printed cloth, 10 yards to the dozen, two buttons.	467	$1.60 per dozen. Terms: 1% ten days, Net 30 days.
Men's shorts made of 44 x 36 cotton printed cloth, 9 yards to the dozen, two buttons.	259	$1.50 per dozen. Terms: 1% ten days, Net 30 days.

2. Your maximum price shall be subject to the same allowances, discounts and price differentials to different classes of purchasers as those heretofore established by you.

3. You shall keep a copy of this order in your establishment together with your current records as required by Section 1499.12 of the General Maximum Price Regulation.

4. Except as provided in this order, the provisions of the General Maximum Price Regulation shall continue to govern sales of these commodities.

5. This order may be revoked, amended or adjusted at any time.

A copy of this order has been filed today with this office where it is open for inspection by the public.

This order shall become effective immediately.

(S) DANIEL P. WOOLLEY,
Regional Administrator.

4. Amendment No. 1 to Order No. 112 under Section 1499.3 (b) (1) of General Maximum Price Regulation.

OFFICE OF PRICE ADMINISTRATION
350 Fifth Avenue

NEW YORK 1, N. Y., *May 8, 1945.*

In reply refer to

File No. 2-13b1-341.2-8

ROYAL MANUFACTURING CO.,
93 Worth Street,
New York, N. Y.

AMENDMENT NO. 1 TO ORDER NO. 112 UNDER SECTION 1499.3 (B) (1) OF THE GENERAL MAXIMUM PRICE REGULATION

GENTLEMEN: Under date of October 20, 1944, the Regional Office of the Office of Price Administration issued the foregoing order which in-lined the prices for designated commodities reported by you under Section 1499.3 (b) (1) of the General Maximum Price Regulation. Although the order did not in specific terms state that the modified prices were your maximum prices from the date when you first offered the commodities for

sale down to the date of your report, viz., August 1, 1944, such was the intent and purport of the order. It is now considered desirable to give specific statement to that intent.

After due consideration of the foregoing, the Regional Administrator has determined as follows:

(a) The introductory words to the paragraph designated "1." in Order No. 112 under Section 1499.3 (b) (1) of the General Maximum Price Regulation are amended to read as follows:

1. That your maximum selling price for your sales to wholesalers and retailers, prior to August 1, 1944 and subsequent to October 20, 1944, have been and are as follows:

* * * * *

A copy of this amendment has been filed today with this office where it is open to inspection by the public.

This amendment shall become effective immediately.

Very truly yours,

(S) DANIEL P. WOOLLEY,
Regional Administrator.

STATEMENT OF CONSIDERATIONS ACCOMPANYING ORDER NO. 112

* * * We have carefully checked all available market sources of men's shorts and our surveys show that in March 1942 a 44 x 36 cloth was used only for bookbindings and was considered impractical and unserviceable for use in men's undershorts. We have also conferred with the merchandising division of J. C. Penny Co., Sears Roebuck Co. The Belk Stores and various other

Buying Offices who specialize in low end and other types of merchandise, and could find no merchandise offered or sold, made of a material with a thread count as low as 44 x 36 for these purposes. However, quantities of shorts were purchased on or about March 1942 made from material 60 x 48 at $1.80 per dozen which was the general prevailing market price.

In view of the above facts we are of definite opinion that the recommended price of $1.60 per dozen is a liberal price in line with the general level as contemplated under GMPR, and the price should be revised under Section 3 (e) of the GMPR.

* * * * *

We contacted Mr. Griffith of the Merchandising Division of J. C. Penny, to learn whether or not they purchased in March 1942 a short made of material 44/36 count. Mr. Griffith stated that the cheapest short on the market at that time was an 80/80 unshrunk which they retail at 29¢ and which cost them $2.00 per dozen. He further stated that if 44/36 were available, which he doubts, the retail price would have been from 14¢ to 19¢ although he did not know of any one who had offered for sale during that period a short made of material of this low count. Furthermore, he stated that J. C. Penny did not at any time carry a short made of as low a count as 44/36 because it is completely unserviceable.

We contacted Mr. Herman Hartman, president of Arkwright Inc. (Whether or not his organization ever purchased a short made from material 44/36.) He stated that to the best of his

knowledge a short of this count was never produced in March 1942 because it would be too inferior to offer for sale as it would give no service. He stated however, that he had purchased 80/60 unshrunk at $1.75 to $2.00 per dozen. Due to different sources of supply there is a variation of price.

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